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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1628

POWER AUTHORITY OF THE STATE OF NEW YORK,

Petitioner,

vs.

ERNEST L. FADEL and VARSEN FADEL, as Executrix of the Last Will and Testament of Edmund L. Fadel,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

The proceeding herein was commenced pursuant to Section 1007 of the New York Public Authorities Law and the Condemnation Law to acquire by condemnation respondents' uplands and riparian rights and easements appurtenant to such uplands in filled-in lands formerly under water. The rights of the parties hereto are accordingly governed by the laws of the State of New York subject to any overriding Federal right vested in the petitioner. This is pointed out at this time because of petitioner's continuous erroneous assertion in its brief that this condemnation proceeding is brought by it pursuant to the Federal statute governing condemnation. Its insistence that this is

a *Federal* condemnation proceeding rather than a State condemnation proceeding arises from its attempt to distinguish, on this basis, the holding adverse to it found in *Grand River Dam Authority vs. Grand Hydro*, 335 U. S. 359, (See page 21 of petitioner's brief.)

The judgment of the Court of Appeals, which petitioner seeks to review, unanimously affirmed an award to the respondents of $5,000.00 as compensation for the appropriation of their riparian rights and easements appurtenant to the uplands condemned by the petitioner for the construction of the Niagara Power Project. In 1958 the petitioner was granted a license by the Federal Power Commission for the sole, express purpose, as stated in the license, "of developing all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States" (page 11, pages 8, 9 and 10, ex. 44). This license was issued pursuant to the provisions of Public Law 85-159, 85th Congress, approved August 21, 1957, which also provided explicitly as follows:

> "The Federal Power Commission is hereby expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project."

A reading of the statute and of the license immediately discloses that neither one contemplated or provided that the purpose of the licensed project was the improvement of navigation on the Niagara River. Accordingly, the judgment herein, unanimously affirmed by the Court of Appeals, rests upon the indisputable fact that the respondents' riparian rights and easements appurtenant to the uplands appropriated by the petitioner were *not* taken for the purpose of improving navigation and commerce on the Niagara River. It is in the light of this indisputable fact that the contention of the petitioner that the judgment herein is erroneous, as a matter of law, must be examined.

The Issue Involved

On pages 2 and 3 of its brief the petitioner purports to set forth the questions presented to this Court. It is respectfully submitted that the four questions which it lists are inaccurate and do not constitute a proper statement of the issue involved. Question No. 1, found on page 2, is inaccurate because the property herein was not condemned pursuant to Section 21 of the Federal Power Act. Questions No. 2, 3 and 4 incorporate in them assumptions of fact and of law which are wholly unfounded and are irrelevant to the true issue before this Court.

The only issue involving a federal question which is properly before this Court upon this petition may be stated as follows: May a licensee of the Federal Power Commission, granted a license to use the Niagara River *solely* for a hydroelectric power project, appropriate the uplands of the respondents without paying compensation to them for the value of the riparian rights and easements in lands formerly under water which are appurtenant to and add a substantial increment to the value of the uplands?

The petitioner's contention is that its position as a licensee pursuant to a license authorized by congressional action grants it an immunity against the payment of compensation for the taking of the respondents' riparian rights and easements in lands formerly under water, appurtenant to uplands condemned, even though the taking was not for the purpose of improving navigation and commerce on the Niagara River. Its argument is that the power project was related to "commerce" and that riparian rights and easements may be taken for any commercial purpose by a Federal licensee without the payment of compensation. It asserts that in this respect it enjoys the same "dominant servitude" over riparian rights that the United States itself enjoys when such rights are appropriated pursuant to an

express act of Congress determining that such appropriation is essential for purposes of improving navigation and commerce on a navigable stream.

The State courts below have unanimously rejected this contention of the petitioner. In its memorandum decision found on pages 2a and 3a of petitioner's Appendix, the Court of Appeals said:

> "We find nothing in plaintiff's license or in the treaty and the legislative and administrative action and procedures underlying it, and certainly no clear authorization there or elsewhere, supportive of plaintiff's contention that the right to exercise the dominant servitude, in favor of the United States, in respect of defendants' water rights, devolved upon it, so as to exempt it from payment of compensation for their taking. (*Federal Power Comm. v. Niagara Mohawk Power Corp.*, 347 U. S. 239, 249; *Henry Ford & Son v. Little Falls Fibre Co.*, 280 U. S. 369; *Public Utility Dist. No. 1 of Pend Oreille County v. City of Seattle*, 382 F. 2d 666.) Our conclusion in this regard renders academic the other issues tendered by the appeal."

It is respectfully submitted that a brief examination of the pertinent law applicable to the issue herein completely supports the correctness of the conclusion and judgment of the Court of Appeals.

No Valid Reason Exists in Fact or in Law for the Granting of the Writ Herein

In its brief the petitioner seeks to find support for its contention in the history of the Niagara River. However, reference to the 1909 treaty between the United States and Great Britain relative to the boundary waters between the United States and Canada and the 1950 treaty between the United States and Canada relative to the construction by the two countries of remedial work and governing the diversion of Niagara water are completely irrelevant and

immaterial to the issues herein. Public Law 85-159, the Niagara Redevelopment Act, (set forth at pages 13b-16b of petitioner's Appendix) which authorized the Federal Power Commission to issue a license to the Power Authority for the express and sole purpose of "the construction and operation of a power project", nowhere contains any specific grant of immunity to the petitioner from the constitutional requirement to pay just compensation for the taking of riparian rights and easements of other persons. On the contrary, the enabling statute points unmistakably in the opposite direction. Section b(3) of that Act requires that the Power Authority shall sell 445,000 kilowatts of power to the then licensee of Project 16 (the then operating Niagara Mohawk Company) on condition that such project 16 licensee surrender its license, upon certain terms which significantly included the following:

> "(a) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise."

The very fact that the statute includes an express provision for the waiver by the licensee of project 16 (Niagara Mohawk) of all claims for damages based upon loss of or damage to its riparian rights constitutes the clearest kind of recognition by Congress that, in the absence of such waiver, an owner of riparian rights must be compensated for the taking thereof for purposes of the Niagara Power Project. The congressional recognition of the necessity for expressly providing for a waiver of such right as to the

licensee of project 16 is completely destructive of petitioner's claim that Congress, in authorizing the issuance of a license to it, itself exercised its "dominant servitude" over the Niagara River or conferred it on petitioner so as to entitle the petitioner, as a licensee, to appropriate riparian lands, rights and easements of other property owners without the payment of compensation.

In the same way, the license issued to the petitioner by the Federal Power Commission completely negatives its contention that it was vested thereby with the right to take riparian rights and easements of others without compensation. On page 7 of Ex. 44 (the license) the Federal Power Commission considered the request of the International Paper Company, an intervenor in the proceeding, that a condition be included in the license which would recognize and protect its riparian right which entitled it to the use of 700 cubic feet per second of water from the Niagara River for hydroelectric development. In the license issued the Commission said in this connection:

> "In our view we are not required to pass upon the claim of International Paper Company in this proceeding, and consequently, we are not including in the license any of the alternative conditions requested by the Company. However, if it has a valid claim against the Power Authority of the State of New York, the Company will be protected by Section 10 (c) of the Act (16 U. S. C. 803 (c)) which reads in part as follows:
>
> '• • • Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.' "

It is respectfully submitted that this is a clear recognition by the Federal Power Commission that under Federal

law, the riparian rights of the International Paper Company to use water of the Niagara River are entitled to protection and compensation and that the petitioner herein, as a licensee, was subject to liability if its project affected these rights. The very license itself contained in it an express provision that it is issued to the petitioner subject to the provisions of Section 10 (c) of 16 U. S. C. 803 (c) above quoted. Rather than relieving the petitioner from liability for damages caused to the riparian rights of other persons by its project, the license expressly confirms the existence of such liability.

Furthermore, the Federal Water Power Act (16 U. S. Code) by Section 821 expressly reserves and protects existing water rights from impairment by anything done under the Act. Section 821 thereof, entitled "State Laws and Water Rights Unaffected" reads as follows:

> "Nothing contained in this Chapter shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective states relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

From the foregoing it is crystal clear that neither by congressional enactment or by the license of the Federal Power Commission has the petitioner ever been granted the Federal "dominant servitude" over the Niagara River which entitled it to appropriate respondents' uplands without payment for the valuable and vested riparian rights and easements appurtenant thereto. There is no question that the purpose of the license, the development of electric power, was a commercial one;—respondents have never claimed the contrary. However, taking of property *for that kind of commercial purpose* does not constitute a condemnation for the purpose of "navigation and commerce

on the Niagara River" which is the only purpose which permits the taking of riparian rights and easements of others without the payment of just compensation.

The petitioner has also called to the attention of the Court Public Law 91-611, 84 Stat. 1818 enacted December 31, 1970, included as Section 111, 32 U. S. C. Section 595 A. This statute provides explicitly that in condemnation proceedings brought by the United States for the improvement of rivers, harbors and waterways the compensation to be paid for real property above the high water mark of navigable waters shall be the fair market value of such property "based upon all uses to which such real property may reasonably be put, including its highest and best use, many of which uses may be dependent upon access to or utilization of such navigable waters."

The purpose of this statute was to limit the effect of the Federal "dominant servitude". Its enactment now makes it necessary, when uplands are taken by the United States, to pay, as an increment to the value of such uplands, the value attaching thereto by reason of their riparian location. This enactment now makes applicable to the United States itself the same rule of damages in cases where property with riparian rights and easements is appropriated, even for navigational purposes, as is applicable in all other cases of condemnation.

The petitioner's discussion of the history of the legislation is both immaterial and irrelevant. The statute itself, as enacted, has now limited the immunity which even the United States itself enjoyed, under its dominant servitude, in condemning land to which riparian rights and easements attached, even for navigation purposes. If there were any validity to petitioner's claim that it stands in the shoes of

the United States, then this statute strikes another destructive blow at its contention herein, because in all condemnation proceedings now pending, riparian rights and easements appurtenant to fast lands taken for public purpose, even by the United States itself, are compensable.

From the foregoing it readily appears that there is no statutory support whatsoever for the petitioner's claim that it was vested with the Federal "dominant servitude". For all purposes in this proceeding, its status is simply that it is the holder of a license issued by the Federal Power Commission to use the Niagara River for the purposes of a power project, with all the responsibilities and liabilities attaching thereto. As such licensee, it was bound by the provisions of Section 803 (c) and Section 821 of the Federal Water Power Act which respectively made it liable for all damages caused to the property of others and which expressly protected vested rights of others in the use of the water affected. No act of Congress has relieved it of this responsibility.

With this statutory background reference may now be had to the decisions of the Supreme Court, relied upon by the New York Court of Appeals, whose holdings are diametrically opposite to the petitioner's contention herein. In *Henry Ford and Son vs. Little Falls Fiber Co.*, 280 U. S. 369, the unanimous Court held that a riparian owner in the navigable Mohawk River was entitled to an injunction against the uncompensated destruction of its riparian rights by a subsequent licensee under the Federal Water Power Act. This was followed by the decision in *Federal Power Commission vs. Niagara Mohawk Power Corp.*, 347 U. S. 239 wherein the Court discussed in detail and approved fully the holding in *Henry Ford and Son* and again confirmed the principle that a licensee under the Federal

Water Power Act was required to compensate persons for the taking of riparian rights for a project unconnected with purposes of navigation.

The clear and unmistakable holdings, contrary to the petition herein, of the *Niagara Mohawk* case and the case of *Henry Ford and Son* merit setting forth in some detail herein the opinion of this Court in the *Niagara Mohawk* case. On pages 246-247 of the *Niagara Mohawk* decision this Court described the rights of a licensee of the Federal Power Commission for the development of electric power as: "usufructuary rights to use the water for the generation of power as distinguished from claims to the legal ownership of the running water itself". The Court went on to hold that even the exercise by the Federal Government of its dominant servitude over navigable waters did not include taking, without compensation, other rights preexisting under State law in the absence of "clear authorization" (page 249). An example of such authorization, the Court held, was found in the Act of March 3, 1909, considered and passed upon in the case of the *United States vs. Chandler-Dunbar Power Co.*, 229 U. S. 53 concerning which the Court said:

> "A classic example of such a clear authorization appears in the *United States vs. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667. The Act of March 3, 1909, there authorized the exercise of the dominant right of the United States to take all of a navigable river's flow for purposes of interstate commerce. It did so in explicit terms. * * *
>
> "In that case the Government took the entire flow of the stream exclusively for purposes of interstate commerce. The Court accordingly recognized the Government's absolute right, within the bed of the stream, to use all of the waters flowing in the stream, for purposes of interstate commerce, without compensating anyone for the use of those waters.

"That decision is not applicable here. The issue here is whether the much more general and regulatory language of the Federal Water Power Act shall be given the same drastic effect as was required there by the language of the Act of March 3, 1909. We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. Unlike the statute in the *Chandler-Dunbar* Case, the Federal Water Power Act mentions no specific properties. It makes no express assertion of the paramount right of the Government to use the flow of the Niagara or of any other navigable stream to the exclusion of existing users * * * *

"The Act treats usufructuary water rights like other property rights. While leaving the way open for the exercise of the federal servitude and of federal rights of purchase or condemnation, there is no purpose expressed to seize, abolish or eliminate water rights without compensation merely by force of the Act itself.

"The references in the Act to preexisting water rights carry a natural implication that those rights are to survive, at least until taken over by purchase or otherwise. Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act.

"The legislative history of the Act discloses no substantial support for the drastic policy which the Commission seeks to read into it. To convert this Act from a regulatory Act to one automatically abolishing preexisting water rights on a nation wide scale calls for a convincing explanation of that purpose. We find none. In fact, the legislative history points the other way" (Pages 249-253).

Following this explicit holding that licenses for a power project, issued pursuant to the Federal Water Power Act,

do not authorize the destruction of existing riparian rights without compensation, the Court went on to discuss with approval the case of *Henry Ford and Son, supra,* which expressly held that a Federal licensee could not take water riparian rights of others without payment of compensation therefor. On pages 254-255 of the opinion the Court said:

> "In 1930, this Court passed upon the basic question now before us when it came here in a different connection. In Henry Ford & Son v. Little Falls Fibre Co., 280 U. S. 369, 74 L. ed. 483, 50 S. Ct. 140, Mr. Justice Stone, writing for a unanimous Court, held that a riparian owner of a right to use water for power purposes in the navigable Mohawk River, in New York State, was entitled to an injunction against the uncompensated destruction of that right by a subsequent licensee under the Federal Water Power Act. The New York Supreme Court had granted such an injunction and awarded damages. This Court affirmed that decision, although the federal license then before the Court had authorized the licensee to raise the navigable waters of the Hudson River to such an extent that they would destroy the value of the riparian owner's right, under state law, to use the fall of tributary waters of the Mohawk for power purposes. It was thus held that the Federal Water Power Act had not abolished the complainant's private proprietary water rights, existing under New York law, to use navigable waters for power purposes.
>
> "Even though the rights which the respondents (the riparian owners) here assert be deemed subordinate to the power of the national government to control navigation, the present legislation does not purport to authorize a licensee of the Commission to impair such rights recognized by state law without compensation" *Id.* 280 U. S. at 337.
>
> "After quoting from 10 (e) (liability for damages caused by the licensed project), 27 (saving clause as to proprietary rights under state law), 21 (condemnation rights) and 6 (licensee's acceptance of the conditions of the Act), the Court added:

"'While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration. We think the interest here asserted by the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws and so is one expressly saved by 27 from destruction or appropriation by licensees without compensation, and that it is one which petitioner (the licensee), by acceptance of the license under the provisions of 6, must be deemed to have agreed to recognize and protect.' *Id.* 280 U. S. at 378, 379."

No comment or argument is necessary in order to emphasize how clearly and explicitly the principle of law embodied in the above decisions support the correctness of the judgment herein and destroy the validity of the petitioner's argument in this proceeding. The more recent case of *Public Utility District No. 1 et al. vs. City of Seattle,* 382 F. 2d 666 (9th Cir. 1967) Cert. dismissed 369 U. S. 803, expressly answered in the negative the claim of a licensee under the Federal Power Act that it could condemn uplands and shorelands with riparian rights appurtenant thereto without the payment of compensation for the riparian rights and easements. It rejected the claim of the licensee that its license to construct a hydro project *ipso facto* vested it with the same dominant navigational servitude as enjoyed by the United States itself. In so holding, the majority of the Court said it was of significance that Congress had not expressly bestowed upon the licensee the full measure of its constitutional power (page 670) quoting with approval *Federal Power*

Commission vs. Niagara Mohawk, supra, wherein the Court said:

> "The exercise of that servitude, without making allowances for preexisting rights under State law, requires clear authorization."

The Court also held that the rights and liabilities of the parties involved were the same whether the condemnation proceeding was one in Federal Court, under the Federal Power Act, as in the *Seattle* case, or one brought in State Courts, under State Condemnation Law, such as the case herein. The majority then concluded that a Federal licensee must pay full compensation for all riparian rights and shorelands taken for the purpose of a hydro project.

The dissent in that case was based upon the view of one Judge, unsupported by any authority, that a licensee who brings a condemnation action in Federal Court pursuant to the provisions of the Federal Power Act stands in a different position than a condemnor in a State condemnation proceeding and is *ipso facto* vested with the government's dominant navigational servitude. Even if there were any validity to this distinction, it is of no help to the petitioner herein because the judgment sought to be reviewed was one entered in a New York State condemnation proceeding brought by the petitioner pursuant to the State Condemnation Law and the State Public Authorities Law.

Reference may also be had to the Supreme Court decision of *Grand River Dam Authority v. Grand Hydro,* 335 U. S. 359, wherein this Court reviewed and affirmed a final judgment of the Oklahoma State Court requiring a licensee of the Federal Power Commission to pay compensation for riparian and water rights condemned by it. On page 21 of its brief the petitioner seeks to distinguish this case on the ground that therein the condemnation proceeding was

brought in State Courts and under State laws. This provides no basis for distinction because the proceeding herein is exactly of the same nature; it was brought in the State Courts of New York pursuant to the State Condemnation Law and the State Public Authorities Law.

Reference to the cases cited by the petitioner on page 10 of its brief, excerpts from which are quoted and discussed out of context, reveals that in no way do they negative the correctness of the judgment herein, nor do they support the petitioner's contention. *United States v. Appalachin Power Co.*, 311 U. S. 377 involved a decision wherein the Supreme Court, after finding that the New River was a navigable stream, held that the defendant could not construct a dam upon it without a license therefor from the Federal Power Commission.

In *United States v. Commodore Park*, 324 U. S. 386 the Court held that the claimant could not recover damages for the destruction of riparian rights as a result of work done by the United States itself in the interest of improvement of navigation. The Court noted that there had been no taking or damage to claimant's fast lands, but only an interference with its ability to use a creek adjacent to them. In the absence of the taking of the claimant's fast lands the Courts held that the waters adjoining may be altered by the United States in the interests of navigation without liability for damages. This case illustrates the application to the United States itself of the immunity conferred by its dominant navigational servitude when riparian rights are affected for the purpose of improving navigation. This of course has no application to the facts involved in the instant case.

United States v. Twin City Power Co., 350 U. S. 222 presented a situation where claimant's property was taken

pursuant to a specific act of Congress authorizing the Clark Hill Project for the expressly stated purposes of hydroelectric development, flood control and improvement of navigation. The lower Courts had held that improvement of navigation was not the real purpose of the taking and hence claimant's riparian rights appurtenant to fast lands taken were compensable.

In reversing, a majority of the Supreme Court held that the Courts may not substitute their judgment concerning the purpose of a Federal project for the congressional decision on what is necessary for the improvement or protection of navigation. In this respect the Court said, "The decision of Congress that this project will serve the interests of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate." After pointing out that the power of the United States over the flow of a navigable stream is a privilege called a "dominant servitude" or a "superior navigation easement" the majority opinion said, on page 225:

> "The legislative history and construction of particular enactments may lead to the conclusion that Congress exercised less than its constitutional power, fell short of appropriating the flow of the river to the public domain and provided that private rights existing under State law should be compensable or otherwise recognized. Such were *United States v. Gerlock Live Stock Co.*, 339 U. S. 725 and *Federal Power Commission v. Niagara Mohawk*, 347 U. S. 239. We have a different situation here, one where the United States displaces all competing interests and appropriates the entire flow of the river for the declared public purpose."

This case is authority simply for the proposition that a congressional declaration to the effect that the project is for the purpose of promoting navigation is conclusive in

determining whether or not riparian rights condemned for such purpose are compensable or not. In the proceeding before this Court there is, of course, no congressional affirmation that the Niagara River project was for the purpose of promoting navigation on the Niagara River. On the contrary, both the enabling statute and the license limited the project to the sole purpose of developing hydro power, a situation wherein the dominant navigational servitude has no application.

Four Judges dissented upon the ground that even the exercise of the Federal navigational servitude did not exempt the United States from the payment of full compensation for fast lands taken which should include within it the value of riparian rights and easements appurtenant thereto and not dependent upon the flow of water.

United States v. Grand River Dam Authority, 363 U. S. 229 is another decision resting upon the express congressional declaration that the Federal project for which claimant's water power rights were taken was "one for the benefit of navigation and the control of destructive flood waters." The Court again held that it was for Congress to determine the project's purposes, that such determination was binding and that the claimant's water rights were subordinate to the Federal "superior navigation easement which precludes private ownership of the water or its flow."

In *United States v. Virginia Electric and Power Co.*, 365 U. S. 624 the Supreme Court adopted and applied the view of the dissenting Judges in the *Twin City* case, limiting the extent of the immunity enjoyed by the United States when it condemned fast lands for purposes of improving navigation. The Court held that while the Federal dominant servitude allowed the United States, for

the purposes of navigation, to destroy the availability of a stream for water power purposes without compensation to adjoining property owners, it did not absolve the government from paying compensation for easements and increments in value, non-riparian in nature, which were appurtenant to the fast lands condemned. Obviously this holding provides no support for the petitioner herein. Rather, the Supreme Court recognized that the owners of fast lands condemned, to which attached appurtenant riparian rights and easements, must be compensated for such rights and easements as are not related to water, water power or hydroelectric development. In this respect, the *Virginia Electric and Power Co.* case further confirms the correctness of the judgment herein awarding to the defendants the value of their rights and easements in lands formerly under water unrelated to water use and appurtenant to the adjoining uplands taken in condemnation.

Federal Power Commission v. Union Electric Co., 381 U. S. 90 holds simply that a Federal license was necessary for the development of hydroelectric power even on a non-navigable stream. Of course this case in no way touches the issue before this Court.

Finally, the case of *United States v. Rands*, 389 U. S. 121 involves only another holding that the dominant navigational servitude of the United States, when exercised for purposes of navigation, is superior to the riparian rights of private owners because the Federal government occupies a unique position. Hence, it was held that a United States project, specifically authorized by Congress as part of a comprehensive plan for the development of the Columbia River, was an exercise by the United States of its dominant servitude pursuant to the power to regulate navigation.

Hence it followed, said the Court, that riparian rights, even though good against a State under State law, must yield to the superior rights of the United States itself, when taken for the purposes of improving navigation, pursuant to an express congressional enactment.

Upon the foregoing, it is respectfully submitted that the petitioner has wholly failed to establish any grounds upon which the correctness of the final judgment of the New York State Court of Appeals herein can be questioned so as to merit the granting of certiorari herein. There exists no congressional authorization to the petitioner vesting it with the dominant servitude which is unique to the United States Government itself. It is undisputed that the petitioner possesed only a license to use the water of the Niagara River for purposes of a hydroelectric project, wholly unconnected with and unrelated to the promotion of navigation. The decided cases are unanimous and conclusive in their holding that such a licensee is not *ipso facto* vested with the unique dominant servitude possessed by the government of the United States itself. In the absence of such express vesting, the rights and responsibilities of a licensee which condemns fast lands to which riparian rights and easements are appurtenant, for a purpose other than navigation, must be determined in accordance with State law, which requires payment therefor.

This conclusion is inescapable in view of the fact that even when the United States itself exercises its dominant servitude for the purpose of improving navigation, it enjoys no immunity from the payment of just compensation for easements and increments of value, unrelated to water use, which are appurtenant to fast lands condemned (*United States v. Virginia Electric and Power Co., supra*). Such are the rights and easements involved in the instant case, payment for which is required by the judgment herein.

The correctness of this judgment is further emphasized by the provisions of Public Law 91-611 which makes compensable appurtenant riparian rights and easements to uplands appropriated even by the United States itself for purposes of navigation, thereby foreclosing any claim of immunity in favor of the petitioner based upon its assertion that it stands in the shoes of the United States Government. Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari to review the final judgment of the New York State Court of Appeals herein should be denied, as a matter of law.

Respectfully submitted,

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